to claimants in actions for personal injuries at common law. In my judgment pension rights are *ex gratia* payments made to a government servant in respect of his past conduct and service out of the discretion of the Government and independent of the existence of any right of redress given to him against others.

I am satisfied that the weight of authorities and public policy support my view that pensions are not to be brought into account in assessing damages at common law.

Giving the best estimate I can, I award the plaintiff a sum of $109,419 for loss of future earnings. I arrive at that figure as follows: emoluments at superscale D for 2 years less tax; emoluments at superscale C for 4 years less tax: emoluments for acting in superscale B for 1 year less tax. That works out to $119,852. I add to that $8,690 the difference between pension at superscale C at 50 years and compulsory pension received. This gives $128,542. He has received a sum of $19,123 by way of emoluments and deducting that I arrive at $109,419.

Therefore I award him a sum of $110,000 (making it a round figure) for loss of future earnings plus $80,000 for loss of amenities and pain and suffering and $10,000 agreed special damages. I think that represents a reasonable award which in the circumstances of the case warrant. I order that this award be handed to the Public Trustee to administer it on behalf of the plaintiff. Costs to the plaintiff in any event.

Judgment for the plaintiff.

Solicitors: *Cheang Lee & Ong; Dharmananda & Co.*

DATIN SITI HAJAR v. MURUGASU

[O.C.J. (Syed Agil Barakbah J.) May 6, 1970]
[Seremban — Civil Suit No. 154 of 1964]

Land Laws — Right of way — National Land Code, 1965, s. 4 — Effect of repeal of Land Code, 1926 — Interpretation and General Clauses Ordinance, 1948 — Interpretation Act, 1967 — National Land Code, 1965, Part 17, Caps. 1 and 2 — Easements — Whether English common law still applicable.

Interpretation — Repeal of statute — Pending action.

Civil Law — Common law of England — Application of.

In this case the defendant had built an approach road over the plaintiff's land claiming that he had a right of way thereon. The plaintiff sued the defendant for trespass and damages.

Held: (1) there is a clear intention in section 4 of the National Land Code, 1965 that rights, liberties, privileges, obligations and liabilities arising under the Land Code, 1926 and existing at the time of the commencement of the Code shall be governed by the new Code and therefore the proceedings in this case are governed by the National Land Code;

(2) because of the express provisions in Part 17 of the National Land Code relating to easements, the English common law as to easements had ceased to apply in West Malaysia;

(3) even assuming that the common law applies to the present proceedings the defendant has not shown a right to the easement of way either by prescription or under the doctrine of lost modern grant.

Cases referred to:-

(1) *Yong Joo Lim & Ors.* v. *Fung Poi Fung* [1941] M.L.J. 63; [1941] M.L.J. Rep. 54.
(2) *Bank of England* v. *Vagliano Brothers* [1891] A.C. 107.
(3) *Despatie* v. *Tremblay* [1921] 1 A.C. 702, 709.
(4) *Bright* v. *Walker* 149 E.R. 1057.
(5) *Damper* v. *Bassett* [1901] 2 Ch. 350.
(6) *Smith* v. *Baxter* [1900] 2 Ch. 138.
(7) *Palmer* v. *Guadagni* [1906] 2 Ch. 494.
(8) *Gabriel Wade & English Ltd.* v. *Dixon and Cardus Ltd.* [1937] 3 All E.R. 900.
(9) *Hansford* v. *Jago* [1921] 1 Ch. 322.
(10) *Wheeldon* v. *Burrows* (1879) 12 Ch. D. 31.
(11) *Newcomen* v. *Coulson* (1877) 5 Ch. D. 133.
(12) *Strand Electric & Engineering Co. Ltd.* v. *Brisford Entertainment Ltd.* [1952] 2 Q.B. 246 at p. 253.

CIVIL SUIT.

E. J. H. Yong for the plaintiff.

Atma Singh Gill (*Wong Seng Chew* with him) for the defendant.

Cur. Adv. Vult.

Syed Agil Barakbah J.: The plaintiff is the registered proprietor of two pieces of land comprised in Grant No. 2896, Lot No. 478, and certificate of title No. 2422, Lot No. 3190, both of which are situated within the township of Seremban. The two pieces of land were bought by her husband and registered in her name on 13th July, 1955, as evidenced by the documents of title. (Exhibits P2 and P3). The land comprised in Lot No. 3190 has a road frontage with Channer Road, a public road which leads to Seremban town.

The defendant is the owner of land comprised in Grant No. 4485, Lot No. 517, which he acquired in stages from the beneficiaries of the estate of one Tunku Syed Abdul Rahman. (Ex. P1). This Lot 517 is adjacent to the two lots belonging to the plaintiff of which Lot 3190 stands between it and Channer Road. The defendant developed the land comprised in Lot 517 by building houses and sometime in January 1964, constructed a metalled road across the plaintiff's land *i.e.* Lot 3190, as an approach road to link up with Channer Road. Since then the defendant and the occupiers of the houses in Lot 517 have been using this road as access to and from Channer Road.

The facts so far are not in dispute. The plaintiff alleges that since January 1964 the defendant has built the road on her land without her consent and has been wrongfully trespassing on the said land, and as a result she has suffered damages. She therefore claims a declaration that the defendant is not entitled to enter or cross her land or to cause or permit others to enter or cross the same, and also seeks an injunction to restrain the defendant by himself, his servants or agents from entering or crossing the said land or causing or permitting others to enter or cross the same. She also claims general damages and costs of this action.

The defendant, on the other hand, denies the allegations and avers that he has constructed a road

round the perimeter of the said Lot 3190 which does not infringe the plaintiff's land but admits that he has constructed the approach road over the plaintiff's land in order to link up the road constructed by him over his own land with Channer Road. This approach road is about two chains in length and eleven feet in width. The defendant thereby maintains that he has the right of way by user of the said road for upwards of twenty years and therefore he is neither liable for damages for trespass, nor to any of the remedies sought by the plaintiff in this action.

In my view, the whole case rests on the law regarding easements, *i.e.* the right of way. For the purpose of clarity, the plaintiff's land, *i.e.* Lot 3190, is referred to as "the servient tenement" and the defendant's land, Lot 517, as "the dominant tenement". It is clear on the record that the land held by the plaintiff under Lot 478 is not involved in this dispute

Before dealing with the main issue, it is necessary to consider whether this proceeding is governed by the Land Code of 1926 or the National Land Code (Act 56 of 1965).

The plaintiff instituted this action on 10th November, 1964, at the time when the Land Code of 1926 was in force. Subsequently, it was repealed and superseded by the National Land Code (the new Code) which came into force throughout the States of Malaya on 1st January, 1966. On the other hand, the Interpretation and General Clauses Ordinance, 1948, which was still in force at the time the plaintiff instituted this action, was subsequently repealed by the Interpretation Act, No. 23 of 1967, which came into force on 18th May, 1967.

Section 65 of the Act provides for the repeal of the Interpretation and General Clauses Ordinance in so far as it is a federal law but allows it to continue to apply to any written law to which it applied immediately before the commencement of the Act. This section should be construed with section 2 which makes the Act applicable, *inter alia*, to Acts of Parliament enacted after the commencement of the Act and excludes its application for the interpretation of any written law not enumerated therein. In the light of the above, it is clear that for the interpretation of the Land Code of 1926 and the new Code, the Interpretation and General Clauses Ordinance still applies. Now, section 13 of the Ordinance states as follows: —

"Where a written law repeals in whole or in part any other written law, then, unless the contrary intention appears, the repeal shall not —

(a) revive anything not in force or existing at the time at which the repeal takes effect; or

(b) affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed; or

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed; or

(d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any written law so repealed; or

(e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed."

The relevant provision appears to be section 13(e), the effect of which enables the present action to be instituted or continued as if the National Land Code which repeals the Land Code of 1926 has not been passed, subject to the clause "unless the contrary intention appears" in the new Code. This provision is consistent with the rule of construction as summarised in the 11th edition of *Maxwell* on Interpretation of Statutes: —

"*Pending actions.* In general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights."

Such intention is shown in section 4 of the new Code which, apart from preserving the past operation of the Land Code of 1926 or anything done under it, renders any right, liberty, privilege, obligation or liability arising therefrom and existing at the time of the commencement of the new Code to be subject to its provisions. The only laws that are not affected are those enumerated in sub-section (2) which does not include the Land Code of 1926. There is therefore a clear intention in this provision of the new Code to such rights etc., being governed by the new Code. It follows that the law that should govern this proceeding is the National Land Code.

Now, the main issue is whether the common law of England still applied to this country at the time of the institution of this action, *i.e.* 10th November, 1964. The learned counsel for the defendant cited the case of *Yong Joo Lin & Ors.* v. *Fung Poi Fong*[1] which was concerned with the acquisition of an easement of support. When the case came before the Court of Appeal, the Civil Law Enactment, 1937, was still in force, and Terrell Ag. C.J. in the early part of his judgment said: —

"Principles of English Law have for many years been accepted in the Federated Malay States where no other provision has been made by statute. (See for instance *Motor Emporium* v. *Arumugam*). Section 2(i) of the Civil Law Enactment therefore merely gave statutory recognition to a practice which the courts had previously followed."

Thereafter the learned Acting Chief Justice discussed the material parts of this section pointing out at great length the three qualifications necessary for the adoption of the English common law in the Federated Malay States.

Since *Yong Joo Lin's* case some thirty years ago, the position has now changed with regard to the Civil Law Enactment as it was subsequently repealed by the Civil Law Ordinance, 1956, which came into operation throughout the Federation on 7th April, 1956. Section 2(i) of the repealed Enactment is replaced by section 3(1) which states: —

"Save in so far as other provision has been made or may hereafter be made by any written law in force in the Federation or any part thereof, the Court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance: Provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States ... comprised in the Federation and their respective inhabi-

tants permit and subject to such qualifications as local circumstances render necessary."

It will be observed that the new provision is almost in *pari materia* with that of section 2(i) except for the clause "other than any modifications of such law or any such rules enacted by statute" which has been omitted from section 3(1) of the Ordinance. There remains therefore two qualifications to the adoption of the English common law in the Federation under section 3(1): —

(1) it only applies if there is no other statutory provision in the Federation;

(2) it may be applied only so far as the circumstances of the States comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

Apart from section 3(1), there seems to be an apparent change in the intention of the Legislature in the new Ordinance with regard to the application of the common law of England and the rules of equity relating to land tenure or any estate, right or interest therein, with the introduction of section 6 which reads: —

"Nothing in this Part shall be taken to introduce into the Federation or any States comprised therein any part of the law of England relating to the tenure or conveyance or assurance of or succession to any immovable property or any estate, right or interest therein."

The provision of this section, though clear and specific, requires further discussion. The words "this Part" refer to Part II of the Ordinance wherein sections 3 and 5 are relevant. The requirements of section 3 have already been explained above.

Section 5(1) allows the application of English statutes on matters mentioned therein in the same way as would be administered in England unless other provision is made by any local written law. It is clear that the Ordinance allows for reception of the English common law, rules of equity and statutes, subject to the conditions already mentioned. However, the effect of section 6 seems to oust the application of the common law and rules of equity relating to land tenure, transfer or transmission of immovable property, or any estate, right or interest therein. This is so with effect from 7th April, 1956.

The Court of Appeal in *Yong Joo Lin's* case was dealing mainly with the law regarding easement of support. Although the right of way was discussed, it left room for doubt as to whether the decision that the common law doctrine of prescription and the fiction of lost modern grant were applicable to the right of way in the light of express provision under section 103 of the Land Code of 1926. In that case Terrell Ag. C.J. said on page 69 (reprint p. 59):

"So far as easements are concerned, I have already pointed out that although a right of way may be registered against a servient tenement, there is no machinery for registering it on the title of the dominant tenement. So far, therefore, as the latter is concerned, the proprietor is entitled to an additional incorporeal hereditament which does not appear on the register."

Further on page 70 (reprint p. 60), the Acting Chief Justice continued: —

"I conclude, therefore, that there is nothing in the Land Code which expressly prevents the acquisition of an easement of support. On the contrary the inference from section 42(vi) of the Land Code, and illustration (a) to section 54 of the Specific Relief Enactment, lend support to the suggestion that easements can be acquired and enjoyed. The Land Code does not, therefore, constitute such 'other provision' as would exclude the operation of section 2 of the Civil Law Enactment."

As pointed out earlier, the case was decided under the Civil Law Enactment without the provision as found in section 6 of the Civil Law Ordinance. In my view, the provision of this section is so precise that it leaves no room for doubt that the acquisition of easements by the common law prescription, at least as far as the right of way is concerned, is no longer applicable to this country. With the coming into force of the National Land Code the position is made clearer.

It was urged by the learned counsel for the defendant that sub-section (4)(b) of section 340 of the new Code allows the application of the common law. The sub-section states: —

"(4). Nothing in this section shall prejudice or prevent —

(b) the determination of any title or interest by operation of law."

This provision is similar to that of its counterpart in the old Land Code where section 42(vi) states: —

"Nothing in this section shall be construed so as to prevent the title of any proprietor being defeated by operation of law."

Both sections 42 and 340 deal with indefeasibility of registered titles but the latter is wider in its terms as to include easements. In this connection, I am in agreement with what Horne J. said in *Yong Joo Lin's* case on page 75 (reprint p. 64), in dealing with almost the same point: —

"Mr. Shearn's arguments follow more or less the grounds of appeal. I reject his argument that section 42(vi) of the Land Code lets in the application of the common law. In my view an indefeasible title means a title which cannot be made null and void in the first place by anything and then only by the provisions creating exceptions. A defeat by operation of law therefore means a total defeat."

A fortiori a determination of title or interest by operation of law in its present context means a total extinction in the case of easements when construed in the light of the provision for the extinguishment of easements by unity of title and possession by operation of law in section 290 of the new Code.

Easements are dealt with by the National Land Code in Part Seventeen, Chapters 1 and 2. Section 282(1) defines "easement" to mean any right granted by one proprietor to another in his capacity as such and for the beneficial enjoyment of his land in accordance with the following provisions of the Chapter (Chapter 1). The rights capable of being granted as easements are those specified in section 283, which includes the right of way. Section 284 expressly prohibits the acquirement of any right in the nature of easement by way of prescription, *i.e.* by any presumption of a grant from long and uninterrupted user, and also acquirement of such right by implied grant. It makes it incumbent for the granting of easement by express grant, and, as provided under section 286, such grant can only be made with the agreement of the proprietor of the servient tenement and effected by way of executing an instrument in Form 17A. Such

express grant may be either with or without consideration, and may either be in perpetuity or for any term of years. It also makes it possible for the proprietors of those lands by way of agreement to contribute towards the cost of constructing, maintaining or repairing any way, wall, drain or other installation or work which forms the subject-matter of the easement.

In addition, the Code also protects the interests of those who may be placed at the mercy of unscrupulous servient tenement owners. This is provided in Part Twenty-eight under the heading "Collector's Rights of Way" which empowers the collector to consider an application by a proprietor or an occupier of any alienated country land by way of an inquiry under Chapter 4 and to create a private right of way not only for the benefit of the applicant but also for persons acting with the express or implied consent of the applicant to pass and re-pass on the servient land. (See sections 287 to 395). There is a right of appeal to the High Court against the decision of the collector made during the inquiry. The right of way thus created is recorded on both the original and the extract of document of title of the land affected after a survey of its route which is also shown on the document of title either by means of a fresh plan or by way of amendment to any plan already endorsed thereon. In the case of land held under registry title, the registrar is empowered to make a memorial of the right of way in the same manner as done by the collector and thereafter to cause the issue of the document of title to be returned to the person entitled thereto. Considering the above in the light of section 284 of the Code which prohibits the acquisition of the right of way by means of prescription and implied grant, it seems clear that a way is open to those persons who would have acquired the right of way by means of prescription under the common law of England prior to 1956 to apply for a collector's right of way in cases where the agreement of the owner of the servient tenement to execute an express grant cannot be obtained.

Moreover, the purpose of the National Land Code is provided by its long title: "An Act to amend and consolidate the laws relating to land and land tenure, the registration of title to land and of dealings therewith and the collection of revenue therefrom within the States of Johore, Kedah, Kelantan, Malacca, Negri Sembilan, Pahang, Penang, Perak, Perlis, Selangor and Trengganu, and for purposes connected therewith." The rule of construction is that an amending and consolidating Act implies both addition to, and derogation from, the pre-existing law, but such an Act is a complete Code in itself as regards the subjects it deals with. This appears to be the resulting implication of the views of Lord Herschell in *Bank of England* v. *Vagliano Brothers*[2] in the Privy Council when considering the Bills of Exchange Act, 1882. In *Despatie* v. *Tremblay*,[3] also a Privy Council case, Lord Moulton cited with approval the language used by Lord Herschell in the case cited above, and said in relation to the interpretation of a statute: —

"From thenceforth the law is determined by what is found in the code and not by a consideration of the conclusions which ought to have been drawn from the materials from which it has been framed."

In the same passage his Lordship quoted Lord Herschell and said: —

"The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities."

In my view, the National Land Code is a complete and comprehensive code by itself with regard to the acquisition of the right of way. As such, the new Code constitutes such "other provision" within the first exception to section 3(1) of the Civil Law Ordinance. Thus, in my view, under the Civil Law Ordinance the application of the common law of England is excluded both under sections 3(1) and 6, in so far as the right of way by prescription is concerned.

Now, assuming that the common law applies to the present proceedings, the defendant, as indicated in paragraph 1 of his pleadings, relies on the doctrine of prescription by claiming a continuous user for the period of upwards of twenty years. This would involve (a) prescription at common law; and (b) under the doctrine of a lost modern grant.

Before dealing with the two doctrines, it is necessary to state the history of the two pieces of land involved in the dispute. Both the plaintiff and the defendant adduced evidence touching the land in question. The most reliable witness was Haji Redza bin Haji Mohamed Said (P.W. 3), an ex-member of Parliament, a State Executive Councillor for Negri Sembilan, and a resident of Seremban for more than fifty years. He was familiar with both the dominant and servient tenements. In the early period he was residing in his mother's house which was very near Lot 3190 (the servient tenement) and since 1949, when it was bought over by his elder brother before it was sold to the plaintiff, he was looking after it. Whenever he visited the land, which he used to do quite often, he would pass Lot 517 (the dominant tenement). According to him, Lot 517 formerly was occupied by one Tunku Syed Abdul Rahman, a very rich man who owned two motor cars. The land belonged to his father and aunt and was customary land. The family owned it until it was bought over by the defendant. In 1928 Tunku Syed Abdul Rahman built a big house on the land and used to drive his cars over the servient tenement (Lot 3190) in order to get to Channer Road. The owners of this land, namely, three Malay brothers, objected to Tunku Syed Abdul Rahman using their land as access and "things nearly came to a crisis". Eventually around 1929, Tunku Syed Abdul Rahman bought over Lot 3190 and registered it in the name of his mother, Che Puteh. He constructed an access road from the big house in Lot 517 over Lot 3190 to join Channer Road and used it as an approach road. The temporary access road, according to P.W. 3, was an earthen path big enough for a car to pass and was not metalled. Apart from the big house, there were two or three other houses owned by Tunku Syed Abdul Rahman's relations who did not own cars but also used the access road.

Sometime in 1949, P.W. 3's elder brother, Haji Abdullah bin Haji Said, purchased Lot 3190 just before Tunku Syed Abdul Rahman died. It was from this

time that P.W. 3 started to look after the land on behalf of his elder brother. After Tunku Syed Abdul Rahman's death his children were still living in the big house in Lot 517 and they approached P.W. 3 to obtain permission from his elder brother to enable them to use the access road. Permission was granted. Subsequently this lot was sold by his elder brother to the plaintiff sometime in 1955. The plaintiff's husband, Dato' Lokman bin Yusof (P.W. 2), requested P.W. 3 to look after it on behalf of the plaintiff. At that time the children of Tunku Syed Abdul Rahman were still occupying the big house in Lot 517. They again asked P.W. 3 for permission to use the access road. This was conveyed to P.W. 2 who agreed to the request. The witness further stated that sometime in December 1963, or at the beginning of 1964, he saw a number of workmen constructing a metalled road about 12 feet wide on Lot 3190 and there was a steam roller on the road. In cross-examination he denied that the defendant asked for permission to construct the metalled road but admitted that the defendant spoke to him about it and he directed him to see Dato' Lokman (P.W. 2). He went on to say that since 1964, roughly about 90 houses had been constructed on Lot 517 and the new access road had been used by traffic. On or about December 1963, according to Dato' Lokman (P.W. 2), he was informed by Haji Redza (P.W. 3) that the defendant was constructing a road across Lot 3190. He came to Seremban and saw a Chinese contractor and workmen constructing the road. Subsequently, early in January 1964, he received a letter from the defendant. The said letter written by the defendant requested P.W. 2 to obtain the consent of the owner of Lot 3190 for permission to construct the approach road according to an approved lay-out plan. P.W. 2 further stated that when he received the letter the road was already under construction but not yet completed. No permission was ever given to the defendant. The defendant testified that he first became interested in the land during the Japanese occupation sometime in 1945 and purchased two-fifths undivided share of Lot 517 from one Tunku Syed Abdullah as shown by a photostat copy on page 3 of the agreed bundle of documents. (Ex. P1). Subsequently, he purchased the remaining undivided shares of this lot from the other beneficiaries by public auction sometime in 1961. Since 1945 he used to visit the land by car and used the approach road. The road was not properly maintained but originally metalled. He further stated that about five to ten people living there were using the road to and fro as access to Channer Road. He too had been passing it occasionally from 1928 to 1930, and more often after purchasing part of the dominant tenement in 1945. There was no objection from the then owner. He maintained that in 1964 he merely repaired this road by metalling it along the old access road. He did so at the request of the Public Works Department, Seremban, pursuant to a letter dated 13th July, 1964, after he had submitted plans to develop Lot 517. There was no objection from both P.W. 2 and P.W. 3 at that time. Apart from claiming a right to use this access road, the defendant averred that he repaired it on the instructions of the Public Works Department and as such he was under the impression that permission of the plaintiff was not necessary. He admitted in cross-examination that he did not get the plaintiff's consent. There was another access to Seremban town via Jelebu Road but the access across the plaintiff's land was shorter and therefore more convenient to his tenants.

D.W. 3, the defendant's son, corroborated the defendant's evidence in that the access road on the plaintiff's land was badly kept and there were traces of metal on it when he visited his father's land sometime in the latter part of 1962. There were four or five families staying in Lot 517 who used to drive their cars to and from the access road. However, in this respect, D.W. 1, a licensed auctioneer who was appointed by the court for the public auction of Lot 517 stated otherwise. When he visited the place on or about June 1961, he noticed more or less a footpath which led to two bungalows on this lot. There was no other track. As a result he and the court bailiff decided to put this track as access road to the lot mentioned in the proclamation. He remembered the front lot was Lot 3190. He was certain that there was no tar or metal surface on the track. Further, he observed that there was no sign of the track being used by people.

The first vital point that arises from the facts is consent. The late Tunku Syed Abdul Rahman apparently bought the servient tenement (Lot 3190) from the three owners in order to avoid misunderstanding about his using their land as an approach to and from Channer Road. He thereafter constructed the earthen track for the very purpose for his own use and for the use of his family and relations living on the land. After his death, when P.W. 3's elder brother bought over this land, his children who were still occupying the big house sought the permission of P.W. 3's elder brother for the use of the said track. Subsequently, when the land was purchased by the plaintiff they again obtained the consent of the plaintiff for the use of the same. Similarly, in the case of the defendant, although he took it for granted that he had a right to use the track for the reasons explained in his testimony, he too wrote requesting the plaintiff's consent to construct a metalled road. It is therefore clear that all along from 1929 till 1964 the right to use the said track as access to Channer Road depended upon the verbal consent of the respective owners.

The main principle applicable to prescription at common law is stated in *Halsbury's* Laws of England, 3rd edition, volume 12, on page 548 at paragraph 1188: —

"User must be as of right. The user or enjoyment of an alleged right in order to support a prescriptive claim, under the doctrine of prescription at common law, must be shown to have been user "as of right" having been enjoyed *nec vi, nec clam, nec precario*, neither as the result of force, secrecy, or evasion, nor as dependent upon the consent of the owner of the servient tenement. Consent or acquiescence on the part of the servient owner lies at the root of prescription and a grant cannot be presumed from long use without his having had knowledge or at least the means of knowledge."

Similarly, in the case of *Bright* v. *Walker*,[4] the view of Parke B. in the Exchequer of Pleas on the relevant point is: —

"Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth as a trespasser would have done — if he shall have occasionally asked the permission of the occupier of the land — no title would be acquired, because it was not enjoyed, "as of right".

Although the subject-matter of that case concerned a way which had been used adversely and under a claim of right, for more than twenty years, over land in the possession of a lessee who held under a lease for lives granted by the Bishop of Worcester and it was decided under the Prescription Act, 1832, nevertheless the principle, in my view, is the same and should apply to the present case. From the facts outlined, there is therefore no user "as of right" as claimed by the defendant and on this issue alone he should fail.

The next important point is where the dominant and servient tenements are in the possession of the same person. In *Bright* v. *Walker*,[4] in the same passage cited above, Baron Parke continued: —

"For the same reason it would not, if there had been unity of possession during all or part of the time: for then the claimant would not have enjoyed "as of right" the easement, but the soil itself."

A similar principle was adopted in a later case in the Chancery Division in *Damper* v. *Bassett*[5] which is almost on all fours with the present action. The owner of a farm brought an action against the owner of the adjacent farm for trespass in driving a horse cart from the latter's field across certain fields belonging to her. The defendant set up a private right of way under the Prescription Act, 1832, and alleged uninterrupted user for forty years. The court found as a fact that one George Ashby became tenant to the two farmers many years previously and held that the unity of possession of the alleged servient and dominant tenements for the greater part of the forty years preceding the action was fatal to the defendant's claim under the Act and that in the circumstances the user of the right of way for the last forty years would not be evidence of right as against the plaintiffs. Now, in the present case, the facts show clearly that Tunku Syed Abdul Rahman in 1928 was occupying the portion of the dominant tenement on which he built the big house. Thereafter he purchased the adjacent Lot 3190, *i.e.* the servient tenement, (which now belongs to the plaintiff) for reasons already discussed. Although he registered it in his mother's name, he remained in possession of both the dominant and servient tenements till his death in or about 1949. There is documentary evidence to show that the defendant purchased two-fifths undivided share of the dominant tenement sometime in 1945 and it is also admitted by the defendant that he did not occupy the land until 1964. It is therefore reasonable to conclude that the late Tunku Syed Abdul Rahman was in possession of the dominant tenement (Lot 517) from 1928 till his death in 1949, and of the servient tenement from the date he purchased it, *i.e.* 1929 till 1949 before his death when it was sold to P.W. 3's brother. In other words, he was in possession of the dominant tenement for about 21 years and the servient tenement for about 20 years simultaneously. Thus, for the greater part of the thirty-five years for which the defendant is claiming a right of way both the tenements were in the possession of the late Tunku Syed Abdul Rahman. The principle stated above, in my view, applies. It follows, therefore, that the defendant cannot have enjoyed the easement of way "as of right" and such user for the last thirty-five years will not be evidence of right as against the plaintiff.

With regard to the doctrine of a lost modern grant, I would refer to the passage by Horne J. in *Yong Joo Lin's* case on page 64 (reprint p. 74) which I accept with respect: —

"We are entitled to presume a grant made and lost in modern times which is of course a fiction. This presumption is, however, hedged about with certain rules; but, provided that none of these apply to defeat the presumption, the period of enjoyment or user which, in theory, is only evidence on which a grant may be presumed becomes in practice conclusive. The general principle of the law is that where an incorporeal right or an easement has been enjoyed for more than twenty years, the Court will presume a legal origin for such enjoyment if a legal origin is possible; and the doctrine of a lost modern grant is a modern sub-division of the wider principle and is in general only ancillary to a claim to prescription at common law, being applicable to cases of enjoyment commencing within living memory."

The principles are set out in *Halsbury's* Laws of England, volume 12, paragraphs 1194 to 1201, and I refer to the principal ones. The presumption is not rebuttable by showing that no grant was ever made but the user, as in the case of prescription at common law, must be open, as of right and uninterrupted. This latter principle has been discussed above and on the facts as shown it is clear that there being no user as of right, the presumption of a lost modern grant is thereby defeated.

Now, according to modern practice, the defendant should have pleaded that he claimed the right by presumed lost grant. This was so stated by Stirling J. in *Smith* v. *Baxter*[6] and in a later case of *Palmer* v. *Guadagni*[7] it was stated that the defendant need not state in his pleadings the date and the names of parties to the alleged modern grant. Nor will the court make an order for particulars thereof, where a party in relying upon the legal fiction of a lost modern grant. (*Per* Bennett J. in *Gabriel Wade & English, Ltd.* v. *Dixon & Cardus, Ltd.*[8]). The courts, however, sometimes permit a lost grant to be pleaded by amendment at the trial. However, although this was not pleaded in the present case, no harm has been done to the plaintiff whose learned counsel in his submission referred to this doctrine. Nevertheless, with due respect to the learned counsel for the defendant, I cannot understand the stand taken by him in relying in his submission mainly on the doctrine of easement by implication of law instead of on a presumed grant by prescription as indicated in the pleadings.

There is a difference in the creation by grant of an easement. It may be created by an express grant actually subsisting or upon a presumed grant (as in the present case) or upon a grant merely by implication. This last mentioned manner is normally created by an express grant which contains no express mention of the easement whatever but where it is effected by the legal construction of the instrument itself. The cases of *Hansford* v. *Jago*[9] and *Wheeldon* v. *Burrows*[10] were cited by counsel for the defendant. The main principle arising

from both these cases is that such a grant can only be implied where both the dominant and the servient tenements have been in common ownership so that the creation of easement by implication of law may be said to be the outcome of the former relationship between the two tenements.

Secondly, the general rules as explained by Thesiger L.J. in *Wheeldon* v. *Burrows* which dealt with easement of right is subject to "the well-known exception which attaches to cases of what are called ways of necessity". This is created, *e.g.* in a case where an owner grants part of his tenement and the circumstances are such that the part granted or the part retained is land-locked and cannot be approached without committing a trespass over the grantor's portion. In the present case, however, neither the facts show that there was common ownership of the two tenements at any time as evidenced by the two documents of title in the agreed bundle of documents (Ex. P1), nor is there any way of necessity over the track across the plaintiff's land since the defendant admitted that there is another access road. The access road on the plaintiff's land is what I would call a way of convenience to the defendant rather than of necessity. In this respect, therefore, no implied grant can arise in favour of the defendant.

Another important point raised by the defendant's counsel is that where such a way is created, the owner of a dominant tenement has the right to construct a road. He replied on the case of *Newcomen* v. *Coulson*[11] as authority. This case deals with a right of way by an award made under the Inclosure Act, 1760, and, to quote the words of Jessel M.R. (at p. 141) "The inclosure was carried out in a way that was common in former times, by a deed to which all the allottees are parties". I am of the view that this case is in no way applicable to the present action in which the defendant merely relies on the letter from the senior executive engineer, Public Works Department, Seremban, requiring him to construct a metalled road over the said track on the plaintiff's land. (Page 5 of Ex. P1).

The last important point raised in the defendant's argument is that the access to the defendant's land has been described as passing through the plaintiff's land at Channer Road in the Proclamation and notice of public auction dated 15th July, 1961. Under the particulars of land apart from other matters, Lot 517 is written as "situated at Channer Road, Seremban, about half a chain off the road on the west. Access through another property". As stated earlier, Kathiravelu (D.W. 1), the licensed auctioneer, appointed by the court for the sale of land by auction, visited the two lots and on finding that there was no other access to the defendant's land, decided to put the track on the plaintiff's land as an approach road to Lot 517 on to the Proclamation. He admitted that he did not check this track with the Survey Department. The defendant relied on *Wheeldon* v. *Burrows* where the material facts therein concerned several lots of land belonging to a common owner was put up for sale by auction which became abortive in respect of some lots including the one afterwards sold to the defendant. A written agreement was made at the auction to sell one of the lots to the plaintiff's husband and the lot was conveyed to him with general words to include "easements and appurtenances whatsoever to the said piece of land . . .". The conveyance contained no reservation in express terms of any right to the grantor in respect of his other land. It was held that whatever might have been the case had both lots been sold at the same sale by auction, there was, under the circumstances, no implied reservation of any right over the piece of land first sold.

Not only are the facts in the present case different from the case cited above, but the main principles as regards common ownership and conveyance of the lots to the plaintiff and defendant in express terms are totally absent. I do not think that the authority cited is in any way applicable to the present case at all. The fact that the licensed auctioneer included the access road in the Proclamation purely on the ground that he could find no other access track and without further investigation is not sufficient to imply a reservation of a right of way over the plaintiff's land. Indeed, the decision of *Wheeldon* v. *Burrows* has no application and, if at all applicable to the present action, it renders the defendant's case to stand on very weak ground.

Considering the facts and circumstances mentioned above, I give judgment for the plaintiff. I have no hesitation in holding that the defendant is a trespasser and has been wrongfully trespassing on the plaintiff's land since 1964. As such, I also hold that the defendant is not entitled to enter or cross the plaintiff's land or cause or permit others to enter or cross the same. Further, I order that an injunction be issued forthwith restraining the defendant, by himself, his servants or agents from entering or crossing the said land or causing or permitting others to enter or cross the same. The defendant is also liable for general damages and costs.

As regards general damages, the accepted principle is that the normal measure of damages is the amount of the diminution of the value of the land and not the cost of reinstatement, *i.e.* the cost of restoring the land to the condition in which it formerly was. In the present case, the plaintiff has not shown to what extent the value of the land has diminished by the construction of the access road by the defendant. All that her counsel suggested was a sum of $100 *per diem* as reasonable payment by the defendant for the use of the access road on the lines of toll charges. He only referred to the agreement between the defendant and the United Kingdom Services Land Board (Ex. P1, p. 26) wherein the former as lessor covenanted that he would construct, make up and maintain in good repair and condition a carriageway on the said access road, as one of the conditions in consideration of the lessee agreeing to lease 51 bungalows in the course of construction on the lessor's land (*i.e.* the dominant tenement).

There is authority for saying that when a trespass consists in some beneficial use wrongfully made of the plaintiff's land, even if it causes no damage, the plaintiff is entitled to claim by way of damages a reasonable remuneration for that use, as if it had been under an agreement, and in this remuneration compensation for any damage done to the land will be included. In

Strand Electric & Engineering Co. Ltd. v. *Brisford Entertainments Ltd.*,[12] Denning L.J. said: —

"The rule .... is that a wrongdoer, who keeps the owner out of his land, must pay a fair rental value for it, even though the owner would not have been able to use it himself or to let it to anyone else. So also a wrongdoer who uses land for his own purposes without the owner's consent, as, for instance, for a fair ground, or as a wayleave, must pay a reasonable hire for it, even though he has done no damage to the land at all."

The plaintiff however has not produced any relevant factors as a basis to enable this court to assess the damages. In the circumstances, this calls for a common sense approach to the matter guided by the principles stated above. Having seen the land myself together with the parties and their counsel, I assess general damages at $15,000 inclusive of the diminution of the value to the plaintiff's land as a result of the construction of the access road and the reasonable hire for the use thereof by the defendant for the period January 1964 to June 1969.

Judgment for the plaintiff.

Solicitors: *Dato' S. M. Yong & Co.; Shearn, Delamore & Co.*

PUBLIC PROSECUTOR v. ALING BIN AYUN

[O.Cr.J. (Lee Hun Hoe J.) May 8, 1970]

[Kota Kinabalu — Criminal Trial No. 14 of 1961]

Criminal Law and Procedure — Evidence of statements in identification parades — Admissibility under Sabah Criminal Procedure Code, 1959.

In this case the accused was charged with the offence of rape. The main question at issue in the case was the question of identity of the person who was alleged to have raped the complainant. The only evidence of identity was that the complainant identified the person whom she alleged to have raped her to be the accused at the identification parades.

Held: (1) as there is no provision in the Sabah Criminal Procedure Code similar to section 113 of the F.M.S. Criminal Procedure Code, or section 124 of the S.S. Criminal Procedure Code, the general rules of evidence as to the admissibility and relevance apply and there is nothing to prevent the admissibility of statements made to a police officer in the course of investigation except if such statement amounts to a confession;

(2) in the instant case the police had acted fairly in conducting the identification parades and the evidence of identification was admissible.

Cases referred to:-

(1) *Pawanteh & Ors.* v. *Public Prosecutor* [1961] M.L.J. 214, 216.

(2) *Nagalingam* v. *Public Prosecutor* [1957] M.L.J. 196.

(3) *Lee Lian & Ors.* v. *Public Prosecutor* [1956] M.L.J. 191.

(4) *Chapman* v. *R.* (1911) 7 Cr. App. R. 53, 55 & 56.

(5) *Chang Kim Siong* v. *Public Prosecutor* [1968] 1 M.L.J. 36.

CRIMINAL TRIAL.

Stephen Foo for the Public Prosecutor.

Accused in person.

Lee Hun Hoe J.: Accused is charged with the offence of rape contrary to section 376 of the Penal Code.

The case for the prosecution may be summarised. On June 28, 1969 at about 3 p.m. Saribut, Majid and the accused left Majid's house at Mile 6½, Bak Bak, Kudat, to go to Kampong Tajau. Saribut and accused were each pushing a bicycle. They went by way of the beach. At Mile 8 they saw a woman, the complainant in this case, collecting firewood some 10 chains away near the bush. Shortly after they passed the complainant the accused said he wanted to go back. It was then 4.10 p.m. The accused left them on his bicycle. Meanwhile the complainant was tying the firewood she collected into bundles. As she was doing this a man grabbed her from behind and overpowered her. He threatened her with a chopper. Subsequently he had sexual intercourse with her. After he ran away the complainant also ran towards her house which is about half a mile away. That same evening she lodged a report at the police station, Kudat and was later sent to the hospital for medical examination. On July 3, 1969 the accused was arrested. That afternoon an identification parade was arranged. The complainant identified the accused on two separate identification parades as the person who had raped her.

The accused was not represented. He denied he was at the scene of crime on the day the rape took place. His story was that on June 28, 1969 at 7 a.m. he went out to work at Mile 14, Sequati. He finished work at 12 noon. He then went to town to buy some provisions which he took home. He went back to work at 1.15 p.m. and returned home at 9 p.m. After that he remained at home.

The complainant stated that while she was tying a second bundle of firewood a person approached her from behind and grabbed her neck and then snatched away her chopper. This was said to happen 10 minutes after she saw three persons passing by. Both Saribut and Majid gave evidence to the effect that they and the accused walked past complainant some 10 chains away. Shortly after the accused left them on his bicycle. She said that the man then cut loose her trousers belt with the chopper and threatened to kill her with it if she did not obey him. He spoke in Malay which she understood. She was frightened. She struggled to get free but could not. At that time she was four months pregnant. After her trousers dropped down he dragged her to a spot some 6 feet away. He then pushed her down and untied his own trousers and got on top of her. Sexual intercourse followed. After putting on his trousers he ran away. Without even putting on her trousers she got up and ran away towards her house about half a mile away crying and shouting. Her brother-in-law and uncle come out and she told them what happened. Later that day her aunt took her to the police station and lodged a report.

Police constable Chang Piang Min was at the barrack at the time and was instructed to proceed to the police station where he took the report of the complainant. In substance the report relates what happened on that day.